

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Developing a Unified Intercarrier)
Compensation Regime) CC Docket No. 01-92
)
)

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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On the Comments:

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I. INTRODUCTION

On July 24, 2006, the National Association of Regulatory Utility Commissioners' ("NARUC") Task Force on Intercarrier Compensation ("NTFIC") filed an intercarrier compensation reform plan (the "Missoula Plan") with the Federal Communications Commission ("FCC" or "Commission").¹ Missoula Plan supporters subsequently filed a written *ex parte* on November 6, 2006, detailing an interim process addressing phantom traffic and the creation and exchange of call detail records.² The New Jersey Division of Rate Counsel ("Rate Counsel") submits these comments in response to the public notice issued by the Commission seeking comment on the Missoula Plan phantom traffic interim process and call detail records proposal.

¹ / *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, Public Notice, CC Docket No. 01-92, DA 06-1510 (WCB, July 25, 2006). *See* 71 Fed. Reg. 45510.

² / *Comment Sought on Missoula Plan Phantom Traffic Interim Process and Call Detail Records Proposal*, Public Notice, CC Docket No. 01-92, DA 06-2294 (WCB, November 8, 2006). *See* 71 Fed. Reg. 67509.

**A. INTEREST OF THE RATE COUNSEL IN THE INSTANT
PROCEEDING.**

The Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities.³ The Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to the Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996. The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices." The resolution of the complex economic and policy issues that this proceeding embraces directly affects the structure of telecommunications markets, and the prices that consumers pay for basic telecommunications service.

³ / Effective July 1, 2006, the New Jersey Division of Ratepayer Advocate is now the New Jersey Division of Rate Counsel. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jerseyans who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Christine Todd Whitman's Reorganization Plan. The mission of the Ratepayer Advocate is to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (*N.J.S.A. §§ 52:27EE-1 et seq.*). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," *N.J.S.A. § 52:27EE-57, i.e.*, an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." *N.J.S.A. § 52:27EE-12*, and the office of the Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers.

B. BACKGROUND

In this proceeding, the Commission seeks to replace the various existing intercarrier compensation regimes “with a unified arrangement that accommodates competition and new technologies.”⁴ Among the FCC’s goals in this proceeding are economic efficiency, preservation of universal service, competitive neutrality, technological neutrality, and compatibility of any proposal with the FCC’s legal authority to implement such a plan.⁵ Ultimately, the resolution of this complex proceeding will affect consumers’ prices and the competitive landscape. As the Rate Counsel stated in initial comments submitted on May 23, 2005, the Rate Counsel “particularly urges the Commission to consider the impact of new intercarrier compensation schemes on residential and small business consumers, rates for basic services, rural consumers, and low-volume users.”⁶

Missoula Plan supporters filed a written *Ex Parte* on November 6, 2006, detailing a “proposal for an interim and uniform process” to address phantom traffic.⁷ The Missoula Plan supporters seek immediate approval of the interim process and the adoption of the uniform process as part of the order adopting the Missoula Plan. The Missoula Plan supporters seek immediate approval of an interim process and also seek

⁴ / *In the Matter of Developing a Unified Intercarrier Compensation Regime*, FCC CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, Released March 3, 2005, at para. 1.

⁵ / *Id.*, at paras. 31-33.

⁶ / *In the Matter of Developing a Unified Intercarrier Compensation Regime*, FCC CC Docket No. 01-92, Initial Comments of the Rate Counsel, May 23, 2005, at 3. The Rate Counsel also submitted reply comments on July 20, 2005.

⁷ / Letter from Supporters of the Missoula Plan to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed November 6, 2006) (“Missoula Plan Nov. 6 *Ex Parte*”); *See, also*, FCC Public Notice, “Comment Sought on Missoula Plan Phantom Traffic Interim Process and Call Detail Records Proposal,” DA 06-2294, November 8, 2006.

the subsequent approval of a uniform process for the creation and exchange of call detail records as part of a future Commission order adopting the entire Missoula Plan. Both the interim and uniform processes are described in the *Ex Parte*.⁸

II. RECOMMENDATIONS

Commission action that resolves phantom traffic is crucial to ensure that all carriers pay for originating and terminating traffic. Despite the Rate Counsel's opposition to the Missoula Plan,⁹ the Rate Counsel does support the Commission's expedient efforts to resolve the phantom traffic problem, whereby, either by objective or oversight, some carriers are failing to pay their fair share for the use of the public switched telephone network. Rate Counsel supports fully the Commission's decision to address this issue in a separate focused proceeding. As noted by Time Warner Telecom Inc., Cbeyond, Inc., and Xspedius Communications, Inc. in their comments regarding the Missoula Plan:

Phantom traffic is clearly an issue that ILECs and CLECs alike face, and a uniform set of carrier-signaling rules would ameliorate this problem even though the incentives for arbitrage remain. The proposal in the Missoula Plan offers a basis for discussion, although it does not address all aspects of the phantom traffic problem and still risks assigning incorrect terminating charges to the wrong carrier. A focused Commission effort on this subject would permit consensus on this issue that affects carriers across the competitive spectrum.¹⁰

⁸ / *Id.* The "Comprehensive Solution for Phantom Traffic" (Part V of the Missoula Plan) provided for an industry proposal for a uniform process for the creation and exchange of call detail records and for the filing of an interim process to be used while the uniform process is being implemented within 60 days of filing the original Missoula Plan. Missoula Plan, at V.D.3 and V.E. 2.

⁹ / *See, In the Matter of Developing a Unified Intercarrier Compensation Regime*, FCC CC Docket No. 01-92, Initial Comments of the Rate Counsel, October 24, 2006.

¹⁰ / *In the Matter of Developing a Unified Intercarrier Compensation Regime*, FCC CC Docket No. 01-92, Comments of Time Warner Telecom Inc., Cbeyond, Inc., and Xspedius Communications, Inc., October 25, 2006, at 21 (footnote omitted)

The Rate Counsel previously filed related comments in response to Commission requests in WC Docket 05-276 regarding several petitions for declaratory ruling regarding the application of access charges to IP-transported calls.¹¹ As noted in previous proceedings addressing these issues, it is obvious that there is continued confusion related to the scope and applicability of the Commission's *AT&T IP Telephony Order*¹² and the best manner in which to deal with phantom traffic. The Rate Counsel continues to be concerned that some carriers are purposefully gaming the system to avoid access charges. Regulatory uncertainty may allow some carriers to engage in arbitrage and thereby to avoid paying for use of the public switched network. Carriers' failure to pay their fair share could lead to higher end user rates for consumers.¹³ Technological innovation is critical for lowering prices and providing greater choices to consumers, but innovation should not be a means by which carriers avoid paying for their fair share of the cost of the

¹¹ / *Petition of the SBC ILECS for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges* (filed Sept. 21, 2005); *Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination* (filed Aug. 20, 2004), FCC WC Docket No. 05-276, Initial Comments of the Rate Counsel, November 10, 2005 ("Initial Comments re SBC/VarTec Petitions") and Reply Comments of the Rate Counsel, December 12, 2005 ("Reply Comments re SBC/VarTec Petitions"); *Petition for Declaratory Ruling that USA Datanet Corp. Is Liable for Originating Interstate Access Charges When It Uses Feature Group A Dialing To Originate Long Distance Calls*, FCC CC Docket No. 05-276, Initial Comments of the Rate Counsel, January 9, 2006 ("Initial Comments re Frontier Petition") and Reply Comments of the Rate Counsel, January 24, 2006 ("Reply Comments re Frontier Petition").

¹² / *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, FCC WC Docket No. 02-361, *Order*, Rel. April 21, 2004 ("AT&T IP Telephony Order").

¹³ / Reply Comments re Frontier Petition, at 6. *See, also*, Initial Comments re Frontier Petition, at 11-12, Reply Comments re SBC/VarTec Petitions, at 1.

network. One set of consumers should not subsidize another.¹⁴ As stated in the Rate Counsel's reply comments in WC Docket No. 05-276:

The [Rate Counsel] is concerned that continued uncertainty and protracted litigation between industry members will lead to higher prices for consumers. While it is imperative that all carriers pay for the costs associated with using the public switched telephone network, regardless of the technology used, the [Rate Counsel] is hopeful that forthcoming Commission policy will send economically efficient pricing signals (*i.e.*, charges reflect real costs) rather than seek to maintain a supracompetitive level of revenues for incumbent carriers.¹⁵

Certainly, the Commission should refrain from adopting any plan which conveys upon the ILEC the position of final arbiter as to who is responsible for access charges.¹⁶ Petitions and comments filed in FCC WC Docket No. 05-276 indicate that the Commission should address and refute the apparent ILEC sentiments that (1) ILECs are free to pick and choose from which carriers they will seek access charges, and (2) ILECs can compel payment where none is due.¹⁷ Upon initial review, it appears that the process for identification of VoIP-originated traffic set forth by Missoula Plan supporters relies upon the judgment of the terminating carrier as to whether access charges "appear to apply" and terminating carrier supplied factors.¹⁸ The Commission should verify that any plan it adopts to resolve phantom traffic is competitively neutral. As stated regarding the Missoula Plan:

¹⁴ / See, also, Initial Comments re Frontier Petition, at 12.

¹⁵ / Reply Comments re Frontier Petition, at 12-13. See, also, Initial Comments re Frontier Petition, at 14.

¹⁶ / Reply Comments re SBC/VarTec Petitions, at 4-5, 11.

¹⁷ / *Id.*, at 10.

¹⁸ / Missoula Plan Nov. 6 *Ex Parte*, at Appendix B: Process for Identification of VoIP-Originated Traffic.

While the obligation of IP-based providers to pay terminating compensation on calls they originate is prominently featured, nowhere in the plan is there any discussion of the compensation that applies when a call originates with a LEC (or wireless carrier) and terminates with an IP-based provider. If cable operators and other IP-based providers are expected to pay compensation when they originate calls, they certainly should be permitted to collect compensation when they terminate calls, regardless of the technology they use.¹⁹

Setting rules for carriers regarding the creation of a uniform framework for the generation and exchange of call detail records is crucial. As the petitions in Docket No. 05-276 illustrate, the industry needs clear rules regarding the applicability of access charges and the Commission should enforce those rules. It is not clear that the interim plan or the “Comprehensive Solution for Phantom Traffic” contained in the Missoula Plan resolves fairly, efficiently, and comprehensively the uncertainty regarding VoIP traffic as highlighted in filings in Docket No. 05-276. Furthermore, the Commission should adopt affirmative policies regarding phantom traffic and VoIP telephony and not simply adopt mechanisms put forth by the industry. Otherwise, when disagreements arise, as they undoubtedly will, the Commission could be constrained by the continuing absence of a clear policy on which to base its analysis and decision. The Rate Counsel looks forward to the opportunity to analyze further the Missoula Plan proponents’ interim phantom traffic proposal and uniform process, to review stakeholder comments, and to submit reply comments in the instant proceeding.

¹⁹ / Comments of the National Cable & Telecommunications Association, October 25, 2006, at 21-22.

Respectfully submitted,

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